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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DAS CORPORATION, Plaintiff and Respondent, v. OPTIONAL CAPITAL, INC., Defendant and Appellant.	B212430 (Los Angeles County Super. Ct. No. BC390884)

APPEAL from an order of the Superior Court of Los Angeles County, Conrad R. Aragon, Judge. Affirmed.

Law Offices of Mary Lee and Mary Lee; Rehm & Rogari and Ralph Rogari for Defendant and Appellant.

Gregory M. Lee for Plaintiff and Respondent.

Optional Capital, Inc. (Optional) appeals from an order denying its special motion to strike under Code of Civil Procedure section 425.16[1] the first amended complaint for breach of written contract and declaratory and injunctive relief filed by DAS Corporation. DAS alleged Optional had violated the parties' Cooperative Prosecution and Recovery Allocation Agreement (Cooperation Agreement) by refusing to deposit proceeds from a lawsuit against Kyung Joon Kim, also known as Christopher Kim, into the agreed-upon joint recovery fund. Although DAS's first amended complaint includes collateral or incidental references to Optional's litigation-related conduct, we agree with the trial court DAS's claims do not arise from Optional's protected speech or petitioning activity. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Cooperation Agreement*

Optional and DAS are both South Korean corporations that claim to be victims of a multi-million-dollar fraud scheme masterminded by Kim, a United States citizen working in South Korea.[2] DAS retained the law firm of Lim, Ruger & Kim (LRK) to assist in its efforts to recover its losses from Kim and his affiliates; and in May 2003 DAS, represented by LRK, sued Kim and others in Los Angeles Superior Court.

In January 2004 DAS, Optional and the assignee of the claims of certain investors of a third South Korean corporation, LKeBank (eBank), entered into the Cooperation Agreement to facilitate their pursuit of claims against Kim. The Cooperation Agreement recited, in part, "DAS, through the investigatory efforts coordinated by LRK, has made certain factual discoveries and may continue to make additional discoveries . . . that may be of substantial value to Optional and eBank. Optional and eBank desire to utilize the legal services of LRK and the factual discoveries made by DAS to enhance their

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[1] Statutory references are to the Code of Civil Procedure.

[2] Kim is now serving a 10-year prison sentence in South Korea for securities fraud, embezzlement and conspiracy in connection with the scheme to defraud Optional and others.

respective chances of recovery." The Cooperation Agreement also expressed the parties' belief there was a substantial risk Kim and his confederates would fraudulently conceal or transfer property, hindering or preventing their recovery of lost funds "unless each of them cooperate[s] with the other in sharing the facts and evidence and providing the same to LRK as its common legal counsel, thereby concurrently prosecuting their respective claims . . . in the most efficient, expeditious and cost-effective manner." The Cooperation Agreement disclosed certain circumstances in which the interests of Optional, DAS and eBank would potentially or actually conflict and contained the parties' acknowledgement of those conflicts and their express agreement to LRK's concurrent representation of them.

Paragraph 3 of the Cooperation Agreement provided any recoveries from Kim or his affiliates would be deposited into a joint recovery fund: "LRK shall concurrently represent the interest of [Optional, DAS and eBank] in separate actions and any and all recovery made, whether in the civil actions in which LRK is the attorney of record in such separate actions or in criminal proceedings brought by prosecutorial agencies of the state or federal government, shall be placed into a single trust account (i.e., single pot) for the benefit of all Parties for distribution in accordance with the provisions hereof." Paragraphs 4 through 4.7 contained a detailed formula for the distribution of funds recovered from Kim.

Paragraph 6 of the Cooperation Agreement, "Substitution of Counsel," expressly contemplated that one of the parties to the agreement might in the future decide to retain separate, independent counsel: "The provisions of this Agreement shall remain in full force and effect, even if the Parties or any of them, cease to be represented by LRK, provided that the references in Paragraphs 2 [duty to cooperate and disclose] and 3 [concurrent representation for a "single pot"] shall in such event be deemed to refer to the then-counsel of record for each Party."

2. *Optional's Retention of New Counsel and Recovery from Kim*

LRK actively represented Optional for approximately six months and filed a lawsuit on its behalf against Kim and others in United States District Court on June, 1, 2004 (*Optional Capital, Inc. v. Kim*, USDC No. CV 04-3866 ABC). In mid-August 2004 Optional filed a substitution of counsel in the district court action, replacing LRK as its attorneys. It appears Optional had retained new counsel to pursue its claims against Kim approximately two months earlier and had notified LRK at that time not to perform additional services for Optional.

In October 2004 DAS filed an action in superior court alleging Optional had breached the Cooperation Agreement by terminating LRK as the parties' joint counsel without first consulting with DAS. DAS voluntarily dismissed the lawsuit in December 2004.

On February 7, 2008 a jury in the federal action found in favor of Optional on its fraud claims and awarded it more than $60 million in damages (the exact of amount of the recovery depended on the exchange rate used). Judgment was entered in favor of Optional on February 19, 2008. Several days after the jury verdict DAS advised Optional its damage recovery was subject to the parties' Cooperation Agreement and demanded that Optional deposit any sums it received from the litigation into the agreed-upon joint recovery fund. Optional refused, insisting in part that, by virtue of its retention of new counsel in mid-2004, it was no longer bound by the Cooperation Agreement.

On May 29, 2008 the district court granted the defendants' renewed motion for judgment as a matter of law, finding that the jury verdict was not supported by evidence presented at trial. A new judgment was entered on June 11, 2008. After unsuccessfully moving to vacate or set aside the judgment, in August 2008 Optional appealed the adverse judgment to the United States Court of Appeals for the Ninth Circuit. That appeal is still pending.

3. *DAS's Action for Breach of Contract and Declaratory and Injunctive Relief*

On May 16, 2008—after the jury verdict in favor of Optional but before the district court's order setting aside the verdict and entering judgment as a matter of law in favor of Kim and the other defendants—DAS filed the instant action in superior court, alleging Optional's refusal to place any recovery from the federal action into the "single pot" for distribution constituted a breach of the Cooperation Agreement. (A copy of the Cooperation Agreement was attached to the complaint as Exhibit A.) DAS sought damages for breach of contract, a declaration that the Cooperation Agreement remained in force notwithstanding Optional's substitution of new counsel for LRK and injunctive relief.[3] On May 29, 2008 DAS filed a first amended complaint, which was substantially the same as its initial pleading. (The first amended complaint did not attach a copy of the Cooperation Agreement.)

4. *Optional's Demurrer and Special Motion To Strike*

In addition to demurring to DAS's first amended complaint, on August 27, 2008 Optional filed a special motion to strike the entire pleading pursuant to section 425.16. In its motion Optional argued the gravamen of DAS's action was Optional's termination of LRK as joint counsel and its independent litigation activities for recovery of its losses resulting from Kim's misappropriation of funds and fraud. Thus, according to Optional, the statements and conduct at issue were all statements made in a judicial proceeding or in connection with an issue under consideration by a judicial body or conduct in furtherance of the exercise of Optional's constitutional right to petition in connection with an issue of public interest. Optional also argued there was no reasonable probability DAS could succeed on the merits of its claims because the Cooperation Agreement was void or unenforceable as a matter of law; there was no breach of contract as alleged by DAS because the judgment in its favor had been vacated by the district court; and the

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[3] According to DAS's complaint, any claims eBank might have against Optional were assigned to DAS in May 2008.

equitable claims for declaratory and injunctive relief were barred by laches. The hearings on both the demurrers and special motion to strike were set for September 24, 2008.

Following full briefing and oral argument, the trial court denied the special motion to strike. The court concluded there was no protected activity at issue because the gravamen of DAS's lawsuit was simply Optional's refusal to put proceeds of litigation into the joint recovery fund as required by the parties' Cooperation Agreement, not the contract provisions concerning LRK's concurrent representation of DAS and Optional: "The alleged breach has nothing to do with the contract provisions naming joint counsel. That contract provision only emerges based upon Optional's argument (as an affirmative defense) that a change in counsel somehow renders the entirety of the contract void." Because Optional did not establish that section 425.16 applied to DAS's action, the court did not consider whether DAS had demonstrated a probability of prevailing on its claims.

Because DAS acknowledged the judgment in favor of Optional in the federal action had been vacated by the district court (and was then, as now, on appeal to the Ninth Circuit), absent new allegations by DAS to "plead around" those facts, the court stated Optional's demurrers to the breach of contract and injunctive relief causes of action would be sustained without leave to amend. "Optional cannot have refused to do what it had not the power to do i.e., deposit the proceeds of a vacated judgment into a single pot as required by the contract, and there is no basis for the court to enjoin or mandate that Optional do so." However, the court overruled the demurrer to the declaratory relief action pleaded by DAS, finding a clear dispute between DAS and Optional as to whether Optional had any obligation to comply with the terms of the Cooperation Agreement regarding the deposit of litigation proceeds. "[A] declaration of legal rights is appropriate."

Optional filed a timely notice of appeal from the order denying its special motion to strike. (§§ 425.16, subd. (i); 904.1, subd. (a)(13).)

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[4]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)[5]

In ruling on a motion under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating

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[4] SLAPP is an acronym for "strategic lawsuit against public participation." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8, fn. 1.)

[5] Under the statute an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

In terms of the so-called threshold issue, the moving party's burden is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Hylton v. Frank Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271 (*Hylton*).)

If the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's

attempt to establish evidentiary support for the claim.'" (*Taus*, at p. 714; *Wilson*, at p. 821; *Zamos*, at p. 965.)

"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1055.)

2. *The Trial Court Properly Denied Optional's Special Motion To Strike*

Optional contends the trial court incorrectly determined it had not made the required, threshold showing that the three causes of action alleged in DAS's first amended complaint arise from protected activity. It argues the court erroneously assessed the gravamen of DAS's action as relating to Optional's refusal to deposit proceeds from litigation into a joint recovery fund, rather than Optional's decision to terminate LRK's concurrent representation, retain new counsel and independently pursue its claims against Kim, which are all protected litigation activity within the scope of section 425.16, subdivision (e)(1) and (2). Optional also asserts, even accepting the trial court's assessment of DAS's lawsuit, its refusal to share the proceeds from the federal court action is a statement made in a public forum in connection with a public issue (§ 425.16, subd. (e)(3)) and conduct in furtherance of its exercise of the constitutional right to petition in connection with an issue of public interest (§ 425.16, subd. (e)(4)).

Optional's arguments mischaracterize DAS's claims and fundamentally misapprehend the reach of section 425.16. To be sure, a cause of action arising out of the defendant's "litigation activity" directly implicates the right to petition and is subject to a special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89-90 [action for breach of release clause in contract subject to special motion to strike because alleged breach consisted of filing action purportedly released under the contract]; see *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 [malicious prosecution action by its very nature arises out of defendant's constitutionally protected petitioning activity (the

underlying lawsuit)].) Nonetheless, "a defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] . . . [I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) "Accordingly, we focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279; *Hylton*, *supra*, 177 Cal.App.4th at p. 1272 ["[W]e assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim'"].)

The Cooperation Agreement obviously includes a number of provisions concerning the parties' litigation against Kim and his confederates, but the gravamen of all three causes of action in DAS's first amended complaint is that Optional breached the agreement by refusing to deposit proceeds from its as-of-then-successful federal court action into the agreed-upon joint recovery fund. Although Optional's retention of new counsel to independently pursue litigation against Kim no doubt involved protected First Amendment activity, the allegedly wrongful and injury-producing conduct is separate from that decision and relates only to the proposed post-litigation distribution of Optional's recovery. The parties' dispute about the proper division of those funds, whatever their source, does not rest on protected speech or petitioning activity within the scope of section 425.16. (See *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 ["'[a]lthough a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute'"]; *Paul v. Friedman* (2009) 95 Cal.App.4th 853, 866 ["The statute does not accord anti-SLAPP protection to suits

arising from any act having any connection, however remote, with an official proceeding. The statements or writings in question must occur in connection with 'an issue under consideration or review' in the proceeding."].)

Optional's special motion to strike is similar to the section 425.16 motion at issue in *Hylton, supra*, 177 Cal.App.4th 1264. Hylton sued his former attorney, alleging the attorney had breached his fiduciary duty to him by "concoct[ing] a scheme to extract an excessive fee." (*Id*. at p. 1269.) The scheme allegedly included making false statements to Hylton, who had sought the attorney's advice in connection with a wrongful termination action, that legal action was necessary to protect Hylton's ownership in company stock he had received pursuant to a founder stock purchase agreement; manufacturing a dispute with the company over Hylton's stock ownership; and inducing Hylton to settle the case, thus triggering the contingency fee that was based on the amount of stock Hylton retained. (*Ibid.*) The attorney filed a special motion to strike, arguing section 425.16 was applicable because the action was based on the attorney's protected petitioning activity: "[T]he complaint sought to pursue claims that arose from statements made before a judicial proceeding or in connection with an issue under consideration by a judicial body, and therefore the underlying conduct constituted protected petitioning activity within the meaning of the anti-SLAPP statute." (*Hylton*, at pp. 1269-1270.)

The Court of Appeal affirmed the trial court's denial of the special motion to strike, holding, "Hylton's claims allude to [the attorney's] petitioning activity, but the gravamen of the claim rests on the alleged violation of [the attorney's] fiduciary obligations to Hylton by giving Hylton false advice to induce him to pay an excessive fee to [the attorney]." (*Hylton, supra*, 177 Cal.App.4th at p. 1274.) "If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Id.* at p. 1272.) Similarly, in the case at bar, DAS's claims include allegations relating to First Amendment activity, as do

Optional's defenses, particularly its assertion the Cooperation Agreement is void because it improperly limited its ability to select separate counsel; but the essence of DAS's claims against Optional is that Optional wrongly refused to share the proceeds from the Kim litigation, conduct that was separate from, and subsequent to, Optional's actual exercise of its right to sue Kim. (See also *Freeman v. Schack, supra,* 154 Cal.App.4th at pp. 730-732 [client's claims against former attorney for breach of fiduciary duty or malpractice do not fall within scope of § 425.16 merely because claim followed or was associated with protected petitioning activity by the attorney on the client's behalf]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1187-1190 [client's claim against former attorney for violating rule 3-310 of Rules of Professional Conduct not within § 425.16 even though it occurred in the context of litigation].)

Optional's alternative argument that its refusal to share its recovery in the Kim litigation with DAS is conduct in furtherance of the exercise of its protected right to petition within meaning of section 425.16, subdivision (e)(4), fares no better. Kim's criminal misconduct and the efforts of Optional and other victims to recover funds misappropriated by him may well be matters of public interest. But Optional's decision not to comply with the "single pot" provision of the Cooperation Agreement, even if subsequently described in court filings, is neither protected speech or petitioning activity nor an act in furtherance of those constitutional rights. Section 425.16 is not properly stretched to encompass a claim merely because the conduct from which it arises is in a chain of activity that ultimately includes the exercise of First Amendment rights. (See *Freeman v. Schack, supra,* 154 Cal.App.4th at pp. 729-730; see also *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 275.)

DISPOSITION

The order denying the section 425.16 special motion to strike is affirmed. DAS is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.